

5 Official Opinions of the Compliance Board 105 (2007)

**NOTICE REQUIREMENTS – CONTENT – PURPOSE OF
CLOSED SESSION NOT REQUIRED – CLOSED SESSION
PROCEDURES – VOTING – VOTE TO CLOSE MAY
OCCUR IN SMALLER ROOM, SO LONG AS WOULD-BE
OBSERVERS ARE ADMITTED – WRITTEN STATEMENT
– ALTERING STATEMENT DURING CLOSED SESSION,
NOT PERMITTED – MINUTES – FAILURE TO REVIEW
AND APPROVE DRAFT MINUTES, HELD TO BE A
VIOLATION – ACT NEITHER PROHIBITS NOR REQUIRES
ACCESS TO SEALED MINUTES BY MEMBERS OF PUBLIC
BODY – ADMINISTRATIVE FUNCTION EXCLUSION –
DECISION WHETHER TO UNSEAL MINUTES, HELD TO BE
WITHIN THE EXCLUSION**

February 5, 2007

Ms. Margaret Young

The Open Meetings Compliance Board has considered your complaint raising a number of concerns about Open Meetings Act compliance by the Charles County Board of Education (“County Board”). Eric Schwartz, Esquire, the County Board’s attorney, submitted a timely and detailed response on its behalf. For a more orderly opinion, we have reordered and summarized the issues, first addressing issues related to notice of meetings; then the process for closing meetings; then the basis on which one particular meeting, on August 8, 2006, was closed; and finally issues about minutes, including disclosures to be made after certain closed meetings.¹

For the reasons explained below, we conclude that the County Board did not violate the Act in connection with notices of closed sessions or the process by which meetings were closed, except that we are unable to reach a conclusion about the

¹ Mr. Schwartz noted that the Compliance Board normally only considers specific incidents alleged to have violated the Act, rather than general questions concerning interpretation of the Act. However, the complaint focused on particular practices of the County Board and, at least in part, referred to specific time periods. Thus, to the extent that the record permits, we will address Open Meeting Act issues appropriately raised in the complaint. Of course, we limit our review to the application of the Open Meetings Act and decline to address the application of other statutory provisions mentioned in the complaint, such as access to documents under the Public Information Act. *See, e.g., 2 OMCB Opinions* 21 n.1 (1998) (Compliance Board lacks jurisdiction to consider matters outside the Open Meetings Act).

timeliness of the required written statement preceding the closing of a meeting. We are also unable to opine about the lawfulness of closing the August 8, 2006, meeting. With regard to minutes, the County Board violated the Open Meetings Act when it failed to approve minutes of closed sessions that were subject to the Act and did not adequately disclose required information after many of these closed sessions. The County Board did not violate the Act by denying individual members access to minutes of closed sessions or failing to report to the public its votes on motions to unseal minutes of closed sessions.

I

Notice of Closed Sessions

A. Complaint

The complaint questioned the adequacy of information provided in advance of closed sessions of the County Board. Because the County Board makes agendas publicly available prior to each meeting, the public learns the date, place, time, and what the complaint characterized as “boilerplate verbiage” about the statutory authority for the anticipated closing. However, such an agenda “does not adequately inform the public of what [the County Board] specifically intend[s] to discuss because the nature of each legal, litigation and personnel matter is not included.”

B. Response

The County Board addressed its methods of giving notice of its meetings. The public is advised that the latest information is available on the County Board’s web site. On both regularly scheduled meeting notices and monthly meeting agendas, the public is advised when part of a session will be closed. Thus, the County Board contended, it satisfies the Open Meetings Act requirement, § 10-506(b)(3).² Legal citations are included simply for the public’s information.

C. Discussion

Notice of a meeting is to include “if appropriate ... a statement that a part or all of the of a meeting may be conducted in closed session.” § 10-506(b)(3). There is no statutory obligation to include additional information concerning the nature or purpose of the closed session. 3 *OMCB Opinions* 197, 199 (2002) (meeting notice need not explain *why* session might be closed). Therefore, we find that no violation occurred.

² All statutory references are to the Open Meetings Act, Title 10, Subtitle 5, of the State Government Article, Annotated Code of Maryland.

II

Vote to Close Session – Public Access

A. Complaint

Citing events on October 10, 2006, the complainant questioned the County Board’s practice of holding closed sessions in a room other than its regular meeting room. The door was closed by a Board member or staff by the time the chairman requested a motion to close the session. The complainant was advised at the time that, because no member of the public was present, the fact that the door was closed did not matter; a member of the public could always open the door to hear the vote and then leave.

B. Response

In its response, the County Board noted that the room accommodates the County Board and necessary staff and that no member of the public has ever requested access. Thus, the County Board deems the room adequate. The response also indicated that prior to the vote, staff checks the public hallway and the Board room to see if any member of the public is present to witness the vote. No one has ever been turned away. The response denied that the complainant was told that a member of the public could open the door and enter to hear the vote. Rather, she was told no one was present and, had there been anyone, they would have been invited into the room to hear the vote and then leave. The County Board cites 4 *OMCB Opinions* 147 (2005) in support of its position that its practice is consistent with the Act.

C. Discussion

The Act does not prohibit the County Board from holding its closed sessions in a room smaller than its regular meeting room, so long as an interested member of the public may observe the vote to close a meeting. Of course, a public body may not simply melt away to an undisclosed room, for that would deprive the public of a realistic opportunity to observe the vote. *See, e.g., 1 OMCB Opinions* 191 (1996). In this case, however, the smaller room is just across the hall from the larger meeting room, and we assume that members of the public are aware of its use.

The phrase “interested member of the public” may be illusory here, given the County Board’s report that “in the past four years, no member of the press or public has ever attended, asked to attend, or in any way attempted to attend” the vote to close a meeting. Nevertheless, no matter how many trees have fallen in the forest unobserved, one day Bishop Berkeley will appear, and there will be a sound. So the County Board must be ready to admit someone who wants to observe the vote. There

is no evidence before us that the County Board's process denied a member of the public access, or even sent a message that public attendance would not be welcome. *Cf. 4 OMCB Opinions* at 154. Thus, we conclude that no violation occurred.

III

Written Statement Prior to Closed Sessions

A. Complaint

The complaint noted that, for the last year or so, the County Board has used a "template document," partially completed by the school system's attorney, describing the topics for closed session discussion. According to the complaint, items may be added to the form as discussion develops and, at the conclusion of the closed session, the attorney requests the chairman to sign the document. To the complainant's knowledge, this document is not available to the public.

B. Response

The County Board indicated that it uses the form recommended by the Compliance Board in closing its meeting and disputes the complainant's suggestion that this practice has been in place for only a year. According to the response, this form was in use during the year that the complainant had served as chairman of the County Board. The response indicated that this document is available to the public; however, no one, including the complainant, has ever asked to inspect a copy.

C. Discussion

At the time of closing a meeting, a vote must be conducted to determine whether a majority present support closure. § 10-508(d)(1) and (2)(i). In addition, the presiding officer needs to document the justification for closure:

Before a public body meets in closed session, the presiding officer shall:

...

(ii) make a written statement of the reason for closing the meeting, including a citation of the authority under [§10-508], and a listing of the topics to be discussed.

§ 10-508(d)(2)(ii). This document is a matter of public record and must be retained for at least a year. § 10-508(d)(4) and (5). The form developed by the Office of Attorney General, if properly completed, satisfies the requirements of the Act. *See Open Meetings Act Manual* App. C (6th ed. 2006).

Assuming that the form accurately reflects the justification at the time a meeting is closed, there is nothing in the Act to preclude advance staff work to ready a form for the presiding officer's use. *See 4 OMCB Opinions* 46, 48 (2004). However, the document must be completed by the time of closure. *Id.* This is so because the Act grants a member of the public the right to object to the closure. While an objection does not preclude a closed session, the public body must send a copy to the Compliance Board. § 10-508(d)(3). If the form were permitted to be completed after the start of the closed session, the public body would effectively eliminate the public's right to evaluate, then and there, the asserted basis for the public body's decision to close its meeting.

Unfortunately, the County Board's response did not address the allegation that this form is amended during the course of the closed session, as discussions evolved. Thus, we cannot resolve this issue. *See* § 10-502.5(f)(2). We simply note that if, as the complainant claims, this document is modified during the course of the closed session and the presiding officer signs the form at the session's end, the practice would violate the Act.³

IV

Basis for August 8, 2006 Closed Session

A. Complaint

The County Board closed a session on August 8, 2006, during which the school superintendent briefed the County Board on steps he had taken in connection with a high school planned for opening in 2012. According to the complaint, the superintendent outlined "in great detail his vision for the emphasis and focus for the new high school" The superintendent "wanted to make [Board members] aware of his actions before he met with the [legislative] delegation. He was soliciting Board approval/direction." Two other Board members joined in the discussion, and the complainant questioned why the discussion was being conducted in a closed session. The superintendent apparently left the room in frustration and no action was

³ This aspect of the complaint was framed as describing a practice of the school system administration. While staff normally assists a public body in assuring compliance with the Act, we note that the public body is ultimately responsible for compliance, not the staff. *See, e.g., 3 OMCB Opinions* 164, 167 (2001) (ultimate responsibility for notice and minutes lies with the public body).

taken. Although the complaint raised a series of nine questions, the focus, as far as the Open Meetings Act is concerned, is on the propriety of the closed session.⁴

B. Response

The County Board disputed the facts as described in the complaint and suggested that the complainant had misunderstood the purpose of the meeting and the intent of the superintendent. According to the County Board, the meeting concerned matters within the sole authority of the superintendent; consequently, his briefing of the County Board was outside the scope of the Act. The superintendent already had the County Board's approval for the new school as a result of the school system's Education and Facilities Master Plan, adopted in June 2006. While the County Board described the meeting in four pages of detail, the essence of its response is that the entire matter fell within the legal authority of the superintendent rather than the policy-making purview of the County Board. Citing 3 *OMCB Opinions* 39 (2000), which concerned certain communications between a local school board and school superintendent involving matters under the authority of the superintendent, the County Board contended that the August 8 session involved an executive function (now identified as an "administrative function") to which the Open Meetings Act did not apply.

C. Discussion

It is obvious that the complainant and the County Board through its counsel have very different views about the purpose and nature of the superintendent's presentation on August 8. The Compliance Board faces a dilemma when people attending the same meeting have dramatically different perceptions of what occurred. See 2 *OMCB Opinions* 43 (1999). We have no investigatory powers to establish facts of this kind independently. *Id.*

Given the discrepancy in the respective accounts, we decline to opine on this aspect of the complaint. Had the topic of discussion involved matters within the sole authority of the superintendent, as the County Board contends, the meeting would have involved an administrative function to which the Open Meetings Act did not apply. § 10-503(a)(1).⁵ If, however, discussion extended to policy matters for which

⁴ The complaint's questions about the role of the superintendent and the manner in which the County Board might approve the superintendent's plans are not for the Compliance Board to address. See note 1 above.

⁵ As noted in the County Board's response, before October 1, 2006, the Act used the term "executive function;" the Act now refers to an "administrative function." However, the scope of the exemption has not changed. See, e.g., 5 *OMCB Opinions* 86, 87 n. 1 (2006).

the County Board, rather than the superintendent, was responsible, the discussions were subject to the Act. A full analysis of the law in this area may be found in 3 *OMCB Opinions* 39 (2000).

V

Process for Minutes of Closed Meetings

A. Complaint

The complaint expressed concern about the County Board's obligation to keep minutes of closed sessions. During eight years on the County Board, the complainant recalled only once approving minutes of closed sessions. According to the complaint, a secretary would take notes during a closed session, but minutes were not routinely produced for approval by the County Board. If a request for minutes of a closed session was received, minutes would be produced and approved by the president of the County Board, but the County Board never had the opportunity to approve them. The complaint questioned whether the secretary's notes qualify as minutes. The complaint also questioned whether a new County Board can approve minutes of meetings held by a prior County Board.

B. Response

In response, the County Board distinguished between closed meetings subject to the Act and sessions involving administrative functions, to which the provisions of the Act, including the requirement for minutes, do not apply. As to the former, the County Board indicated that "[d]etailed minutes were kept from all open and closed meetings covered by the Act." However, the County Board acknowledged that it has not formally voted to approve minutes of closed sessions to which the Act applies. The response also indicated that action will be taken to ensure future compliance. As to the ability of a particular County Board to approve minutes of a preceding County Board, the response indicated that nothing in the Open Meetings Act would prohibit such action.

The complaint requested an explanation of the difference between an "executive function" and an "executive session." The term "executive session" is frequently used for any meeting from which the public is excluded. *See Schwing, Open Meetings Laws* § 7.4 (1994). However, the term "executive session" has never appeared in the Open Meetings Act. By altering the term "executive function" to "administrative function" in 2006, the Legislature hoped to eliminate the common confusion between the similar terms.

C. Discussion

Given the County Board's acknowledgment that its practice has not been to approve minutes of closed sessions subject to the Act, extensive discussion is unnecessary. As we previously advised, "As a legal matter, the 'minutes of a public body' become such only after the public body itself has had an opportunity to review and correct the work of whoever prepared the draft minutes." 2 *OMCB Opinions* 11, 13 (1998) (emphasis in original). The failure to approve minutes of closed meetings that were subject to the Act was a violation. See 4 *OMCB Opinions* 303, 306 (2003). It is through the approval of minutes that a public body can be said to accept responsibility for the record of its meetings. *Id.* We welcome the County Board's assurance of future compliance. We also agree with the County Board that nothing in the Act would preclude the members of a public body from approving minutes of meetings held by the body's predecessor membership.

IV

Disclosure Following Closed Meeting

A. Complaint

The complaint raised concerns about the public disclosure requirements following a closed session under § 10-509(c)(2). Included with the complaint were copies of select sections of the County Board's minutes between October 11, 2005 and October 10, 2006. The complaint alleged that the County Board has failed to disclose the votes taken in its closed sessions and provide a synopsis of discussions or decisions made. The complaint also questioned whether certain "boilerplate phrases" satisfied the Act.

B. Response

The County Board acknowledged that its statements provided in publicly available minutes concerning closed sessions often failed to give sufficient detail. According to its response, changes have been implemented to address this deficiency. Enclosed with its response was a copy of minutes of its meeting November, 14, 2006, illustrative of changes that have been made.

C. Discussion

Following a meeting closed under the Open Meetings Act, a public body must make public certain information concerning the meeting:

If a public body meets in closed session,
the minutes for its next open session shall
include:

- (i) a statement of the time, place, and purpose of the closed session;
- (ii) a record of the vote of each member as to closing the session;
- (iii) a citation of the authority under [the Act] for closing the session; and
- (iv) a listing of the topics of discussion, persons present, and each action taken during the session.

§ 10-509(c)(2). Once again, given the County Board's acknowledgment of the deficiencies in its reporting of closed sessions in publicly-available minutes, extensive discussion is unnecessary. Documents submitted with the complaint clearly established that violations had occurred.⁶

VII

Access to Sealed Minutes by Members of Public Body

A. Complaint

At time the complaint was filed, we understand that you were a member of the County Board. The complaint indicated that on September 19, 2006, you had requested copies of all minutes of closed meetings for the prior four to six months. The complaint also indicated that another member of the County Board had sought minutes of a closed meeting held in August 2006, a session that the member was unable to attend. Motions were considered in a closed session to unseal the minutes, but the motions were defeated. Because the minutes were sealed, access was denied. Specifically, the complaint questioned the meaning of the term "public" in § 10-509(c)(3)(ii), which provides that, subject to limited exceptions, "minutes ... of a closed session shall be sealed and may not be open to public inspection."

B. Response

The County Board's response argued that the Open Meetings Act does not speak to the rights of individual members of a public body; it applies to "public

⁶ Based on our review of recent minutes included with the response, we caution against the automatic inclusion of statutory citations not relevant to the topics listed as having been discussed.

bodies as a whole.” The County Board cited in support of its position 2 *OMCB Opinions* 77 (1999), in which we held that we lacked jurisdiction to consider a complaint against a single member of a public body. The response focused on § 10-509(c)(4)(iii), which provides that minutes of a closed meeting shall be unsealed and available for inspection “on request of a person or on the public body’s own initiative” only “if a majority of the ... public body present and voting vote in favor of unsealing the minutes ...” In the County Board’s view, whether treated as “a request of a person” or as an unsuccessful motion of a single County Board member, the complainant’s request for minutes of closed meetings was properly denied.

C. Discussion

We have not previously considered the question whether § 10-509(c) precludes a member of a public body from having access to the minutes of a closed meeting. This issue differs from that considered in 2 *OMCB Opinions* 77 (1999). Here the focus is not on the action of an individual member of a public body but on a decision of the public body itself concerning members’ access to these minutes.

To preserve the confidentiality of closed meeting discussions, minutes of closed meetings generally remain sealed and “not open to public inspection.” § 10-509(c)(3)(ii). Only if the public body elects to unseal closed session minutes do the documents ordinarily become available to the public. § 10-509(c)(4)(iii).⁷

Access by a member of a public body is not the equivalent of access by the public. It would be unreasonable, in our view, and would assign an unlikely purpose to the General Assembly, to construe § 10-509(c)(4)(iii) as a barrier to information flow within the membership of a public body. We hold that this provision does not prohibit a public body from allowing a member to review the minutes of a closed session (or listen to any recording of the session). *See* Tex. Atty. Gen. Op. JC-0120 (1999). *See also* Schwing, *Open Meetings Laws* § 5.58 (1994).⁸ Permitting a member’s access to closed session minutes would not waive the public body’s right to prevent public inspection.

⁷ The Open Meetings Act recognizes two exceptions under which minutes of a closed session automatically become publicly available, *viz*, when a public body closes a meeting for purposes of considering the investment of public funds or the marketing of public securities, § 10-508(a)(5) and (6). Once the funds are invested or public securities marketed, minutes of the closed session are unsealed. § 10-509(c)(4)(i) and (ii).

⁸ The complaint also raised a question about access to closed session minutes by the County Board’s staff. Nowhere in the complaint was it suggested that staff had requested access and been denied. Thus, we decline to address this matter outside the context of an alleged violation.

Here, however, the problem is the converse: a public body's *denial* of access to a member. In our view, the Open Meetings Act simply does not address this issue. It is too much of a leap beyond the statutory text to say that because the Act permits such access, it also requires it. So far as the Act is concerned, the question of member access is left to the public body's discretion. There was no violation.⁹

VIII

Votes to Unseal Minutes

A. Complaint

The complaint also questioned whether votes considered in a closed session should be reaffirmed in a public meeting or recorded in the publicly available minutes. This issue was presented in the context of two unsuccessful motions to make certain minutes of closed meetings available to the public, as discussed in Part VII above.

B. Response

The County Board's position is that its consideration of the requests involved an administrative function to which the Open Meetings Act does not apply. The County Board also noted that whether other law would require that the final decision be reaffirmed in a public meeting is beyond the jurisdiction of the Compliance Board.

C. Discussion

We agree that a public body's consideration of a motion to make public sealed minutes of a closed session would qualify as an administrative function to which the Act does not apply. § 10-503(a)(1)(i). The County Board was administering one of its statutory obligations – a provision of the Open Meetings Act itself; none of the Act's other defined functions applied. *See 3 OMCB Opinions* at 40. Because the actions on the motions were outside the scope of the Act, there was no obligation to report the results of the votes under § 10-509(c)(2)(iv).¹⁰

⁹ Perhaps other law limits or eliminates the public body's discretion. *See King v. Ambellan*, 173 N.Y.S.2d 98, 100 (N.Y. Sup. Ct. 1958) (effect of New York education law). On this we do not comment.

¹⁰ We also agree with the County Board that any obligation it might have to reaffirm in a public meeting any action taken during a closed session under other law is beyond the jurisdiction of the Compliance Board. *See* note 1 above. This issue apparently involves an interpretation of the § 3-504 of the Education Article, Annotated Code of Maryland.

IX

Conclusion

We find that the County Board did not violate the Act in connection with notices of closed sessions or the process by which meetings were closed, except that we are unable to reach a conclusion about the timeliness of the required written statement preceding the closing of a meeting. We are also unable to opine about the lawfulness of closing the August 8, 2006, meeting. With regard to minutes, the County Board violated the Open Meetings Act when it failed to approve minutes of closed sessions that were subject to the Act and did not adequately disclose required information after many of these closed sessions. The County Board did not violate the Act by denying individual members access to minutes of closed sessions or failing to report to the public its votes on motions to unseal minutes of closed sessions.

OPEN MEETINGS COMPLIANCE BOARD

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